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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1966**

**No. 698**

SEYMOUR SALB,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SEYMOUR SALB,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on August 4, 1966, rehearing denied, September 20, 1966.

### Opinions Below

The opinion of the Court of Appeals is not yet reported and is printed as Appendix A. The transcript of the sentencing proceeding is printed as Appendix B.

### Jurisdiction

The judgment of the Circuit Court of Appeals was entered on August 4, 1966. Rehearing was denied on September 20, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## Question Presented

Whether it is permissible for a federal judge to impose a more severe sentence upon a criminal defendant because the defendant has exercised his constitutional right to plead not guilty and stand trial.

## Constitutional Provisions

The constitutional provisions involved are the Fifth and Sixth Amendments to the United States Constitution.

## Statement

Petitioner Seymour Salb seeks review of a judgment entered on January 20, 1966 in the United States District Court for the Southern District of New York[1] (Metzner, J. presiding), and affirmed on August 4, 1966 by the United

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[1] The Unted States District Court had jurisdiction over the matter because petitioner was charged with violating federal criminal statutes, viz., Title 18, U.S. Code, sections 2, 2314, 2315, and 371. Indictment 64 Cr. 648, filed on July 13, 1964 named as defendants Caesar Bottone, John Cancelarich, Leonard Fine, Sidney Martin Fox, Seymour Salb, Nathan Sharff, and three other individuals who were not tried and who are unimportant in the context of this appeal. The indictment contained eleven counts, of which petitioner was charged with four, viz., 1, 8, 9, and 10. Counts 1 and 9 charge petitioner with violation of Title 18, U.S. Code, sections 2 and 2314. (During the course of the trial, Count 9 was dismissed as against petitioner). Count 8 charges petitioner with violation of Title 18, U.S. Code, sections 2 and 2315, and Count 10 charges him with conspiracy (Title 18, U.S. Code, section 371) to violate these sections. The present indictment superceded an earlier indictment (62 Cr. 963) filed on October 29, 1962 which contained substantially the same charges and which issued against Joseph Gerace and all those named in the 1964 indictment except petitioner (and one Maurice Rosenblatt). On December 21, 1962, defendants Cancelarich and Fine pleaded guilty to all 5 counts of the 1962 indictment and on January 11, 1963, Gerace did likewise.

Footnote 1 continues on next page

States Court of Appeals for the Second Circuit (rehearing denied September 20, 1966).

"The enterprise that was the subject of this indictment involved stealing and preserving cultures Lederle had developed, temporarily removing and copying documents that outlined manufacturing procedures, and then selling the cultures and the copies primarily for ultimate exportation to Europe." *United States* v. *Bottone, Salb, and Sharff*, —— F. 2d —— (2d Cir., decided August 4, 1966). Seymour Salb, Caesar Bottone, and Nathan Sharff "did not steal the processes or the cultures" (R. 2873); they were "on the receiving end." *United States* v. *Bottone et al.* The actual stealing was done by "two former Lederle employees, Sidney Fox and John Cancelarich, and their lieutenant Leonard Fine", who were correctly characterized by the Court of Appeals as "the chief culprits." *Ibid.* The "chief culprits" pleaded guilty to all the charges against them (5 against Cancelarich and Fine and 9 against Fox) and were given "light sentences of six months imprisonment." *Ibid.* Salb, Bottone, and Sharff pleaded not guilty, stood trial, and were found guilty (on 3, 3, and 4 charges respectively). They were each given sentences of two years imprisonment.[2]

An analysis of the facts surrounding the sentencing shows that the trial judge imposed a harsher sentence on petitioner

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Footnote 1 continued

On November 2, 1964, defendant Fox pleaded guilty to all 9 counts with which he was charged in the present indictment, viz., Counts 1 through 7, and 10 and 11. Sentencing of these four defendants was held in abeyance pending the trial of defendants Bottone, Salb and Sharff.

[2] A motion by petitioner Salb (and Sharff) to have the defendants who pleaded guilty sentenced before the trial was denied. Joseph Gerace, a minor participant, received a suspended sentence.

Salb (two years) than on the "chief culprits" (six months) not because of any difference in culpability, remorse, or need for rehabilitation or deterrence, but solely because Salb asserted, and the "chief culprits" waived, the constitutional right to plead not guilty and stand trial.

The trial judge did not base the different sentences imposed on Salb and the "chief culprits" on any difference in "culpability." Indeed if he had considered relative culpability, Salb would have received a lower sentence than the chief culprits. The trial court found that Dr. Fox "is the manipulator of the whole thing and that he made at least $80,000." (R. 2899)[3] He found further that the chief culprits stole the processes "on their own, wilfully and knowingly". (R. 2873) "Nobody told you to do this. You did this on your own. You weren't goosed, as the saying goes, by either Salb, or Sharff or Bottone. The three of you did this, stole from your employers for gain." (R. 2897) Petitioner Salb, on the other hand, merely "knew that it was going on." (R. 2873) There can be no dispute that the trial judge correctly regarded petitioner Salb as less culpable than the chief culprits.[4]

Nor did the judge regard the chief culprits' decision to plead guilty as evidence that they were more remorseful than Salb. Indeed he specifically told them that if the plot

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[3] At another point the trial judge said that Nathan Sharff was "the head of this." (R. 2873) In the context in which it was said, "this" may have had reference to the "receiving end," rather than the entire scheme. In any event, there was no claim, nor could there be, that petitioner Salb was the "head" of any aspect of the transactions.

[4] Among the six relevant defendants, petitioner was convicted of the least number of charges (3) and the bail set for petitioner ($1,000) was less than that set for defendants Bottone or Sharff ($2,500 each).

had not been revealed by another, "I have great doubt whether any of the three of you would have opened your mouths. It is a sort of heads I win, tails you lose situation. If you are not caught you will keep the profits and if you are caught you confess immediately and expect the court not to impose a jail sentence." (R. 2897-2898)[5] Moreover, a difference in remorse would only be relevant if it reflected a step along the road to rehabilitation and away from recidivism. But the judge here, in enumerating the factors which he considered in imposing sentence on the defendants in this case, explicitly eliminated the need for rehabilitation or the fear of recidivism: "knowing that none of you are ever going to do anything of this type again." (R. 2873)

Neither did the judge base the different sentences on any difference in the need for deterrence. He did consider deterrence of others in imposing sentence. But he clearly did not regard people in Salb's situation as in need of a stronger deterrent than those in the chief culprits' situation. To the contrary, he emphasized the need for a "deterrent to other people of your same mentality, [meaning the chief culprits who held advanced degrees in chemistry] and in the same areas of trust . . ." [meaning the chief culprits who stole from their employers]. (R. 2898)

The only relevant variable between Salb and the chief culprits, therefore, and the variable on which the sentencing judge clearly relied in imposing a harsher sentence on Salb,

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[5] In an effort to show that the sentencing judge relied on differences in remorse, the Government, in its brief to the Court of Appeals, emphasized that the chief culprits had cooperated with "American Cyanamid, the victim of the thefts." But in response to a suggestion made at the sentencing hearing that such cooperation should be considered, the sentencing judge specifically said: "I am not the least bit interested in the cooperation with American Cyanamid." (R. 2883)

is that Salb asserted, and the chief culprits waived, the constitutional right to plead not guilty and stand trial.

This issue was properly raised prior to the imposition of sentence on Salb. In addressing the court, counsel said:

> "If one is to be punished for going to trial, I don't think that is quite in accordance with our present-day method of the administration of justice."[6]

It was also properly raised on appeal. Petitioner's brief devoted several pages to this issue. (See appellants' brief pp. 97-104).

## This Court's Power to Review

It should be made clear at the outset what this Court is *not* being asked to do. It is not being asked to "enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment." *Gore* v. *United States,* 357 U.S. 386, 393 (1958). As in *Townsend* v. *Burke,* 334 U.S. 736 (1948), "it is not the duration or severity of this sentence that renders it invalid," 334 U.S. at 741; it is the fact that the trial court based its sentence upon an unconstitutional criterion—petitioner's having asserted his constitutional rights—that renders the

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[6] Counsel for defendant Sharff stated further:

> "Sharff went to trial, as he had a perfectly legal right to do. He went to trial. He had a perfect right as a citizen and as a defendant in a criminal case to put the government to its proof. Now, I appreciate the fact that there are situations where it can be said: Well, the man didn't go to trial. He pleaded guilty. He saved the government the expense of trial, whereas this man by going to trial, it may be said, cost the government the expense of a trial. That is probably true, but I think that is the cost of the administration of justice as we have it in this district and in this country today." (R. 2865-2866)

sentence constitutionally defective.[7] Since the constitutionality of the standards employed by the District Court is being challenged, the fact that the sentence was within the limits allowed by statute does not bar review.[8] If petitioner's sentence is found to be constitutionally defective it is, of course, not necessary that he be given a new trial on the question of guilt or innocence. Nor is it necessary for this Court to impose a new sentence. The case should be remanded to the District Court with instructions to resentence petitioner giving no weight to the fact that he asserted his constitutional rights.

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[7] Compare *Stack* v. *Boyle*, 342 U.S. 1 (1951), where the Court reversed a trial court's determination of bail although the setting of bail is largely a discretionary function. The Court said:

> "Petitioner's motion to reduce bail did not merely invoke the discretion of the District Court setting bail within a zone of reasonableness, but challenged the bail as violating statutory and constitutional standards." *Id.* at 6.

[8] For example, no one would seriously question the power of this Court to review a sentence that imposed increased punishment upon an individual because of his race or political beliefs, even if the increased punishment were within permissible limits. Cf. *Sims* v. *Georgia*, 384 U.S. 998 (1966) (grant of certiorari, question 5). See also *Gurera* v. *United States*, 40 F. 2d 338, 340 (8th Cir. 1930); *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942); *McLaughlin* v. *Florida*, 379 U.S. 184, 194 (1964). Only factors which are consonant with the Constitution may be given consideration in imposing a sentence, and it is the proper function of this Court to determine which factors are, and which are not, consonant with the Constitution.

## REASONS FOR GRANTING THE WRIT

### I. This Court should declare it unconstitutional to impose a harsher sentence upon a criminal defendant because he has exercised his constitutional right to plead not guilty and stand trial.

In *Griffin* v. *California*, 380 U.S. 609 (1965), this Court considered the "single question whether comment on the failure to testify violated the Self-Incrimination Clause of the Fifth Amendment . . . ." The Court held that it did because:

> "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Id.* at 614.

The constitutional principle thus articulated—that courts are not permitted to impose a penalty on an individual for exercising his privilege against self-incrimination[9]—applies with full force to the practice of imposing a harsher sentence on a criminal defendant for exercising his constitutional right to plead not guilty and stand trial.

The right to plead not guilty and stand trial is implicit in the Fifth Amendment's privilege against self-incrimina-

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[9] More recently in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court, citing *Griffin*, reiterated this constitutional principle in the context of pre-trial interrogation:

> "In accord with this decision, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege [against self-incrimination] in the face of accusation."

*Id.* at 468 n. 37.

See also, *Garrity* v. *New Jersey* ("Appeal from Sup. Ct. N.J. Further consideration of the question of jurisdiction postponed to the hearing of the case on the merits.") 383 U.S. 941 (1966); *Spevack* v. *Klein, cert. granted*, 383 U.S. 942 (1966).

This Court has declined to apply *Griffin* retrospectively. *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406 (1966).

tion and explicit in the Sixth Amendment's "right to a speedy and public trial." It is a fundamental constitutional right which lies at the heart of our accusatorial system of criminal justice. Without it, other rights of the accused which this Court has been so vigilant to preserve would have little meaning. Thus, the constitutional privilege whose assertion has been made costly here (the right to plead not guilty and stand trial) is at least as fundamental as the constitutional privilege whose assertion had been made costly in *Griffin* (the privilege against self-incrimination).

Moreover the "penalty" at issue here imposes at least as great a cost and cuts down at least as much on the constitutional right asserted as did the "penalty" in *Griffin*. In *Griffin*, the penalty consisted of comment on the exercise of the privilege. Here, the penalty consists of a harsher sentence. Courts have long recognized that imposing an increased sentence as "the price" for exercising a right "cuts down on" that right significantly. In *Green* v. *United States*, 355 U.S. 184 (1957), the Court condemned the Government's attempt to force a convicted person to choose between not appealing his conviction and the possibility of more severe punishment if he successfully appeals and is retried.

> "The law should not, and in our judgment does not, place the defendant in such an incredible dilemma." *Green* v. *United States* at 193.[10]

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[10] The United States Court of Appeals for the Second Circuit (Marshall, J.) recently held unconstitutional a similar New York practice. See *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844, 859 (2d Cir. 1965). Compare *Stroud* v. *United States*, 251 U.S. 15 (1919); *People* v. *Henderson*, 60 Cal. 2d 472, 386 P. 2d 677, 686 (1963); *Desmond* v. *United States*, 345 F. 2d 225 (1st Cir. 1965); Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L.J. 606, 623-636 (1965).

It is an even more "incredible dilemma" to force an accused who has not been convicted of any crime to choose between pleading guilty and the possibility of receiving a more severe punishment if convicted after trial.

The Solicitor General of the United States apparently agrees that the practice of imposing a greater penalty because a defendant has exercised his constitutional right to stand trial is not permissible. In the recent case of *Jimmie Johnson* v. *United States, cert. denied,* 382 U.S. 836 (1965), *rehearing denied,* 382 U.S. 1000 (1966), petitioner alleged, for the first time in a petition for rehearing from the denial of certiorari, that the trial judge had erred in imposing sentence on him by weighing the fact that he chose to stand trial. The Court requested the Solicitor General to file a response to the petition for rehearing. 382 U.S. 923 (1965). In his response, the Solicitor General took the position that:

> "We do not for a moment suggest that it is permissible practice for a trial judge to add to a penalty because a defendant has rested upon his constitutional right to put the government to its proof." (citing *United States* v. *Wiley,* 278 F. 2d 500 (7th Cir. 1960).) (Brief of the Solicitor General in response to petition for rehearing, p. 4)[11]

The Solicitor General suggested three reasons, none of which apply here, why the record in that case did not raise this issue.[12]

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[11] Although himself taking the position that this practice is impermissible, the Solicitor General recognized that federal judges have "differing views" on this matter. (citing 1959 Pilot Institute on Sentencing) (see p. 25 *infra*).

[12] The "question was not raised in any form either in the district court or the court of appeals and . . . it was not presented in the petition for certiorari." Here, as demonstrated at p. 6, *supra,* the

Footnote 12 continues on next page

Thus there would seem to be no dispute that in a case which properly raised the issue of increased punishment for exercising the right to plead not guilty and stand trial, as this case does, the Court should grant the writ and declare that practice unconstitutional.

## II. The Court should exercise its supervisory power over the administration of justice in the federal courts and proscribe the practice of imposing harsher sentences on defendants who plead not guilty.

### A. The propriety of exercising the supervisory power

Even if it is felt that the court below did not violate petitioner's constitutional rights, the decision below can and should be reversed as not consonant with the "proper standards for the enforcement of the federal criminal law in the federal courts." *McNabb* v. *United States,* 318 U.S. 332, 341 (1943). The distinguishing feature of the supervisory power is that it is a method of judicial control over

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Footnote 12 continued
question was specifically raised at trial and on appeal. The judge did not weigh against Johnson "the fact that [he] went to trial," but rather "the quality of the defense" (which revealed, among other things, "an attempt to suppress information" and an episode involving an attempted bribe). In this case there was no allegation, nor could there be any, that there was anything in petitioner Salb's defense which could be considered adversely by the judge. The only proof offered by Johnson to demonstrate that he had been penalized for exercising his constitutional right to stand trial consisted of a listing of lesser offenses received by persons arrested at the same time who chose to plead guilty. The Solicitor General correctly observed that "this constitutes an insufficient showing that the sentence imposed on petitioner was unreasonable, [since none] of the persons was in any way connected with petitioner's operations." Here, on the other hand, the defendants who received lesser sentences were all intimately connected in the same operations.

the judiciary itself. See *Sherman* v. *United States*, 356 U.S. 369 (1958).[13] In *Sherman* and *McNabb*, the Court exercised authority over what were essentially police and prosecutorial practices in which the courts were simply instrumentalities. In this case the Court is being asked to exercise its power over an exclusively judicial practice.[14]

**B. The practice and its effects**

That the practice of imposing harsher sentences on defendants who assert their constitutional right to plead not

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[13] See also, Note, The Supervisory Power of the Federal Courts, 76 Harv. L. Rev. 1656, 1660 (1963). As Justice Frankfurter observed in *Sherman* v. *United States*, 356 U.S. 369, 380 (1958) (concurring opinion):

> "Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means, or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them."

[14] Petitioner does not challenge the "plea bargaining" practice whereby the *prosecutor* reduces the charges against a defendant in exchange for a plea of guilty. Courts have long recognized the distinction between *prosecutorial* and *judicial* inducements to plead guilty. As Judge Weinfeld pointed out in *United States ex rel. Elksnis* v. *Gilligan*, 256 F. Supp. 244 (S.D.N.Y. 1966):

> "It may well be . . . that voluntary, as distinguished from coercive, bargaining between the prosecutor and the defendant has been sanctioned by propriety and practice—in some measure they deal at arm's length. But this is quite different from approbation of plea bargaining between the judge and the accused, where the disparity of position is extremely marked." *Id.* at 255.

Although Judge Weinfeld was specifically addressing himself to the situation where a judge explicitly promises a lower sentence upon a plea of guilty, his remarks apply with equal force to the widespread judicial practice of imposing lower sentences on those defendants who forego their right to trial. See *infra* pp. 15-16.

The distinction between prosecutorial and judicial plea bargaining was also recognized by Judge Marshall in his dissenting opinion in *United States ex rel. McGrath* v. *LaVallee*, 319 F. 2d 308, 319 (2d Cir. 1963):

guilty and stand trial is widespread and "generally accepted by trial judges throughout the United States"[15] is "incontestable";[16] that it is well-known to criminal defendants[17] and the criminal defense bar[18] is also beyond dispute. The United States Court of Appeals for the 8th Circuit has taken "judicial notice of the fact that trial courts quite generally impose a lighter sentence on pleas of guilty than in cases where the accused pleaded not guilty but has been found guilty by a jury." *Dewey* v. *United States*, 268 F. 2d 124, 128 (1959). Sentencing statistics for the federal courts display a definite correlation between pleas of not guilty

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[15] *United States* v. *Wiley*, 184 F. Supp. 679, 685 (N.D. Ill. 1960).

[16] 8 Moore's Federal Practice §11.05[3] (2d ed. Cipes 1966).

See also Newman, Conviction: The Determination of Guilt or Innocence Without Trial 61 (1966) where the author, after a year-long study of sentencing practices, notes that:

> "There is little doubt that, where possible, judges tend to show greater leniency in sentencing to the defendant who pleads guilty than to the defendant who demands a jury trial."

Ohlin and Remington, Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice, 23 Law & Contemp. Prob. 495, 502-503 (1958), have observed that

> ". . . inducements offered by the trial court to plead guilty may vary. In some systems, an offender may be told the sentence he will receive if he pleads guilty. . . . A less obvious way is the maintenance of a system where the common assumption of offenders is that a plea of guilty will result in sentencing concessions.

[17] See, *e.g.*, Newman, Pleading Guilty for Considerations: A Study of Bargain Justice, 46 J. Crim. L., C. & P. S. 780, 785-87 (1956).

[18] See *e.g.*, the statement by Judge William J. Campbell in Pilot Institute on Sentencing, 26 F.R.D. 231, 288 (1960):

> "In a large metropolitan court it would be impossible to keep abreast of the large number of criminal cases if it were not generally known among the practicing bar that consideration is given to those who are willing to plead guilty."

and increased punishment;[19] direct questioning of federal judges establishes that a large majority of them impose more severe punishment on defendants who plead not guilty;[20] and interviews with defendants who have pleaded guilty reveal that they and their lawyers were well aware of, and often acted in response to, the expectation of increased punishment in the event they were convicted upon

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[19] In 1963 the following figures were released for the federal courts:

| *Plea* | *% Imprisoned* | *% Getting Year or More* |
|---|---|---|
| original plea of guilty | 43.4 | 31.7 |
| not guilty, changed plea to guilty | 38.3 | 26.7 |
| convicted by court | 53.3 | 40.4 |
| convicted by jury | 72.2 | 57.6 |

Administrative Office of the United States Courts, Federal Offenders in the United States District Courts (1963).

These figures substantially confirm the findings of a Yale Law Journal survey of all 240 federal district judges, in which sixty-six per cent of the 140 judges who returned questionnaires indicated that they

> "consider the defendant's plea a relevant factor in local sentencing procedure. . . . The estimates of the extent to which the fine or prison term was diminished for a defendant pleading guilty varied from 10 to 95 per cent of the punishment which would ordinarily be given after trial and conviction."

66 Yale L.J. 204, 206-207 (1956).

[20] In the Yale Law Journal survey, *supra*, there were 93 affirmative and 47 negative answers to the following question:

> "When there is no mandatory sentence for the crime or the particular criminal, and the court has authority to vary the sentence, is it accepted practice to take into consideration the fact that the person to be sentenced pleaded guilty, rather than not guilty"?

Id. at 206-207 n. 17.

There were 81 affirmative responses to the next question:

> "If the answer to [the question just stated] is 'Yes,' is it accepted practice to give less severe sentences if the person pleaded guilty, rather than not guilty?" Id. at 207 n. 18.

a plea of not guilty.[21] It can hardly be denied that the practice in issue induces a great many federal defendants to forego their constitutional rights to plead not guilty and stand trial. Nor are the effects of this practice limited to guilty defendants; there is disturbing evidence to suggest that innocent defendants are sometimes induced to plead guilty by the fear of harsh penalties in the event they are erroneously convicted.[22]

Although the fact that this practice is widespread is freely admitted by judges,[23] it is rare that a sentencing judge will explicitly threaten a defendant with a harsher sentence in the event he pleads not guilty, or explicitly offer the inducement of a lighter sentence in the event he pleads guilty. One federal judge has correctly observed that there is no need for such explicitness, since the "Court's practice [of showing 'more leniency to one who confesses his crime and disposes of his case without cost or consumption of the time of

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[21] See Newman, Pleading Guilty for Considerations: A Study of Bargain Justice, 46 J. Crim. L., C. & P.S. 780, 784 (1956). See also Newman, Conviction: The Determination of Guilt or Innocence Without Trial 61 (1966).

[22] Newman, in Conviction: The Determination of Guilt or Innocence Without Trial (1966) notes that defendants have entered

> "false pleas of guilty under the expectation of judicial leniency where the circumstantial case seems strong or where the defendant is otherwise afraid to submit his fate to a jury." *Id.* at 24.

See also, Comment, 66 Yale L.J. 204, 220 (1956):

> "Confronted with the probability that conviction after trial will substantially enhance punishment, a defendant may decide that assertion of his innocence entails too much of a risk.

[23] See notes 19-20 *supra; Dewey* v. *United States,* 268 F. 2d 124, 128 (8th Cir. 1959); *United States* v. *Wiley,* 184 F. Supp. 679, 685 (N.D. Ill. 1960).

the Court'] will soon be found out without the Court making a statement of policy."[24] The absence of explicitness about this practice does not, however, significantly diminish its deleterious effects on the federal judicial system, since most defendants, especially those with previous experience, have "found out" about it and act in expectation of its rewards and punishments.[25] But it does make proof of its application in any given case extremely difficult. This situation, therefore, is a particularly appropriate one for the exercise of this Court's supervisory power. It has been recognized that the supervisory power "does not depend upon the showing of prejudice in an individual case." *Ballard* v. *United States,* 329 U.S. 187, 195 (1946). Instead the Court has "an obligation that goes beyond the conviction of the particular defendant before the court." *Sherman* v. *United States,* 356 U.S. 369, 380 (1958) (concurring opinion). This Court is not likely to be presented with a record which raises this important issue more clearly.

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[24] Pilot Institute on Sentencing, 26 F.R.D. 231, 289 (1960) (statement by Judge Randolph H. Weber).

[25] "Realistically, the guilty plea process operates effectively only if defendants come to expect, and do receive, greater leniency in sentencing on a plea of guilty than if they demand trial."

Newman, Conviction: The Determination of Guilt or Innocence Without Trial 66 (1966).

> "The way bargaining now works, the more experienced criminals can manipulate legal processes to obtain light sentences and better official records while the less experienced, occasional offenders receive more harsh treatment."

Newman, Pleading Guilty for Considerations: A Study of Bargain Justice, 46 J. Crim. L., C. & P.S. 780, 790 (1956).

### C. Justification offered in defense of the general practice

It is frequently urged that defendants who plead guilty have thereby evidenced remorse,[26] contrition or a "willingness to assume responsibility" for their criminal conduct;[27] and thus, since they are well along the road to rehabilitation, a lighter sentence is warranted.[28] It has been widely recognized, however, that precisely because of the practice in issue, this argument "involves considerable circularity. The reason most defendants plead guilty is simply because they wish to take advantage of what they expect will be the judicial . . . reaction to the plea."[29] Nor does the available empirical data support the remorse-rehabilitation argument. If it were true that the plea of guilty evidences progress along the road to rehabilitation, one would expect there to be an inverse correlation between pleas of guilty and recidivism. But no such correlation

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[26] The Yale Law Journal survey, see note 19 *supra*, found that

> "The predominant basis for a court's considering a defendant pleading guilty less culpable than one denying guilt is the belief that . . . such a confession of wrongdoing evinces a repentent attitude. . . ."

Comment, 66 Yale L.J. 204, 209 (1956).

[27] Report of Advisory Committee on the Criminal Trial of the ABA Special Committee on Minimum Standards for Criminal Justice, 1966, at 47.

[28] One federal judge described his practice as follows:

> "I put the person who pleads guilty in one category and the person who pleads not guilty in another category, because the person who pleads guilty realizes that he has done something wrong and is willing publicly to confess his crime."

Pilot Institute on Sentencing, 26 F.R.D. 231, 287 (1960) (comment by Judge John W. Delehant).

[29] 8 Moore's Federal Practice § 11.05[3] n. 19 (2d ed. Cipes 1966). See also Comment, 66 Yale L.J. 204, 210-211 (1956).

has been cited. To the contrary, there is much evidence to suggest that it is precisely the recidivist—the experienced offender who has "found out" about the practice—who is most likely to plead guilty.[30] Moreover, if it were true that the reason judges impose lighter sentences on defendants who plead guilty is because they regard the plea as evidence of remorse, one would expect to find that those defendants who immediately plead guilty would receive lower sentences than those defendants who initially plead not guilty and then—presumably after some negotiation—change their plea to guilty. But again, the data point the other way. Federal sentencing statistics seem to indicate that those defendants who negotiate before they plead guilty do significantly better than those defendants who immediately plead guilty (even though the latter would seem, as a group, to be more "remorseful" than the former).[31]

Another frequently articulated justification is that those who plead not guilty must be more severely punished because of the administrative need for a large proportion

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[30] See Newman, Pleading Guilty for Considerations: A Study of Bargain Justice, 46 J. Crim. L., C. & P. S. 780, 782 (1956). See also Comment, 66 Yale L.J. 204, 211 (1956):

> "Moreover, while recidivists, poor prospects for reformation, will not be deterred from admitting guilt by the fear of impeaching their communal reputations, first offenders, though truly repentent, may well deny guilt in a desperate effort to avoid the stigma of conviction."

[31] See statistics cited *supra*, note 19.

As one source observed:

> "The differences between defendants who plead guilty originally and those who change to a plea of guilty are the reverse of what a contrition theory would lead one to expect."

Comment, 32 U. Chi. L. Rev. 167, 184 n. 62 (1964).

of guilty pleas.[32] Judge Lummus put this argument starkly when he observed that a "criminal court can operate only by inducing the great mass of actually guilty defendants to plead guilty, paying in leniency the price for the pleas."[33] The incompatibility of this justification with the "remorse" justification is obvious. The "remorse" justification rests on the assumption that guilty pleas generally reflect real remorse and that the proportion of such pleas would not be significantly reduced if the policy of rewarding them with leniency were discontinued. The "administrative need" justification, on the other hand, rests on the contrary assumption that guilty pleas do not reflect real remorse, and that unless a *quid pro quo* is offered as an inducement to a plea of guilty—or conversely, unless a punishment is threatened as a deterrent to a plea of not guilty—more defendants will choose to exercise their constitutional right to plead not guilty and stand trial. Thus the "administrative need" argument is no more than a sophisticated way of claiming that our society cannot live with the constitutional right to plead not guilty and stand trial, unless a significant number of defendants are deterred from asserting this right by the fear of harsher sentences.[34] This then

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[32] See Ohlin and Remington, Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice, 23 Law & Contemp. Prob. 495, 504 (1958):

[33] Lummus, The Trial Judge 46 (1937).

[34] As Judge John W. Delehant candidly put it:

> "I do not think you need to say that, because one exercises constitutional rights, he is entitled to do that without any reservation whatever."

Pilot Institute on Sentencing, 26 F.R.D. 231, 287 (1960). *Griffin* v. *California*, 380 U.S. 609 (1965) would seem clearly to say that a defendant is entitled to do just that—to exercise constitutional rights "without any reservation whatever."

is another attempt to cut "down on the privilege [to plead not guilty and stand trial] by making its assertion costly." *Griffin* v. *California* at 614. This "administrative need" argument—in various forms—has been uniformly rejected by the Court,[35] and should be rejected here as well.

**D. Justifications offered in defense of the practice in this case**

As previously demonstrated, the difference in sentences here cannot possibly be explained on the basis of differences in remorse, culpability, or the need for deterrence, see pp. 3-5 *supra*. Nor can the difference in sentences be justified as merely a reflection of the "reward" earned by the "chief culprits" for pleading guilty rather than a punishment imposed on petitioner for pleading not guilty. In rejecting this argument, the Yale Law Journal correctly observed that "the distinction [between penalizing defendants who plead not guilty and rewarding defendants who plead guilty] is illusory; the fact is that, whether by the means of forfeiting a reward or incurring a penalty, a demand for trial will result in a more severe sentence than would be imposed following a guilty plea."[36] A judge may not cut down on the exercise of a constitutional right "by making its assertion costly." *Griffin* v. *California*, 380 U.S. 609, 614 (1965). It matters not whether its exercise is made costly by withholding a reward rather than by imposing a penalty. The point is that it is improper for judges to encourage defendants—whether by the stick or the carrot—to waive their constitutional rights.

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[35] See, *e.g.*, *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

[36] Comment, 66 Yale L.J. 204, 220 (1956).

The fourfold difference in sentences cannot be justified as a reflection of the reward earned by the chief culprits for "cooperating" with the government. In order to "cooperate"—and thus to earn the reward—the defendant must, of course, waive his constitutional right to plead not guilty and stand trial. A defendant who exercises his right—who insists on his innocence—cannot cooperate. Rewarding cooperation thus has the effect of imposing an impermissible cost on the decision to plead not guilty.

Moreover, it is not clear what is meant by "cooperation" in the context of this argument. If by "cooperation," it is meant that the defendants *testified* against others, it is not at all clear that they did any more than they could legally be compelled to do. For once a defendant has pleaded guilty, he cannot assert his privilege against self-incrimination when called to testify against another defendant.[37] Hence any reward he is receiving is not a reflection of the compelled act of testifying; it is a reflection

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[37] *United States* v. *Gernie*, 252 F.2d 664 (2d Cir. 1958); *United States* v. *Romero*, 249 F.2d 371 (2d Cir. 1957); *United States* v. *Cioffi*, 242 F.2d 473 (2d Cir. 1957); *Knox* v. *State*, 234 Md. 203, 198 A.2d 285 (1964); Cf. *Namet* v. *United States*, 373 U.S. 179, 188 (1963); *Reina* v. *United States*, 364 U.S. 507 (1960). There is some authority for the proposition that a person who pleads guilty can claim the privilege until he is sentenced. See, *e.g.*, *Mills* v. *United States*, 281 F.2d 736, 741 (4th Cir. 1960); *Evans* v. *State of Ohio*, 1 Ohio Decisions 436 (District Court 1852). But see, *e.g.*, *Knox* v. *State*, *supra*. Cf. *Commonwealth* v. *Tracey*, 137 Pa. Super. 221, 8 A.2d 622 (1939). It does not matter to our argument whether or not a defendant who has pleaded guilty but has not been sentenced retains his privilege against self-incrimination until after sentencing. If he does not, then surely the reward cannot be for testimony which he is compelled to give; if he does, then he is being offered an impermissible reward to relinquish a constitutional privilege. In any event, a defendant can always be sentenced before he is called as a witness, thereby eliminating any possible self-incrimination issue.

of the prior act—pleading guilty—which empowered the government to compel the testimony. If by "cooperation," it is meant that the defendant did more than merely testify —that he testified "for" the government—then the dangers of rewarding such cooperation are even greater. All witnesses are of course under a duty to tell "the truth, the whole truth, and nothing but the truth"; and honest witnesses can be counted on to do just that without the promise of reward. It is, of course, true that some dishonest defendants who plead guilty may hold back some of the truth unless offered an inducement to reveal it. But against this danger must be weighed the much greater danger that a dishonest defendant, who will tell the "whole truth" only if he is promised a reward, may "over-cooperate."[38] If by "cooperation," it is meant that the defendants made it a bit more convenient for the government by making themselves available to speak to government agents at convenient times and places,[39] then surely this is a *de minimis* consideration which does not explain—and surely cannot justify—the 400% difference in sentences reflected in this case. Nor

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[38] Courts have long recognized and expressed concern over this danger. As the Illinois Supreme Court has observed:

> "It is . . . universally recognized that such testimony has inherent weaknesses, being testimony of a confessed criminal and fraught with dangers of motives such as malice toward the accused, fear, threats, promises or hopes of leniency, or benefits from the prosecution which must always be taken into consideration. . . ." *People* v. *Hermens*, 5 Ill. 2d 277, 285, 125 N.E. 2d 500, 504 (1955).

See also *Crawford* v. *United States*, 212 U.S. 183, 204 (1909); *Outlaw* v. *United States*, 81 F. 2d 805 (5th Cir. 1936), *cert. denied*, 298 U.S. 665 (1936); *Delvalley* v. *United States*, 88 F. 2d 579 (7th Cir. 1937); *Hanks* v. *United States*, 97 F. 2d 309 (4th Cir. 1938).

[39] See statements of Assistant United States Attorney to the sentencing judge, at R. 2876-2876a, 2882.

can slight increases in convenience begin to offset the evils described in the preceding paragraphs.

Since the practice at issue has such deleterious effects on so many federal defendants as well as on the federal judicial system,[40] this Court should exercise its supervisory power in this case and prohibit the practice.[41]

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[40] The practice in issue has created serious problems for correctional authorities as well:

> "[T]he fact that opportunities and techniques for bargaining exist in our system can have an adverse effect on attempts to rehabilitate offenders and generally to decrease crime rates. What happens, for example, when one man, merely because he is unsophisticated, does not know of bargaining techniques nor of the right lawyer to contact, is sentenced to prison while another more experienced offender, a recidivist who commits the same offense, arranges a sentence to be served on probation?"

Newman, Pleading Guilty for Considerations: A Study of Bargain Justice, 46 J. Crim. L., C. & P. S. 780, 790 (1956).

It has been widely recognized that the practice in question distorts the legitimate aims of sentencing; see, *e.g.*, Ohlin and Remington, Sentencing Structure: Its Effect upon Systems for the Administration of Criminal Justice, 23 Law & Contemp. Prob. 495, 499-500 (1958); Comment, 66 Yale L.J. 204, 219 n. 77 (1956).

[41] Even if the Court has some doubt—and we think there is none—that petitioner was punished for pleading not guilty and standing trial, it would be appropriate, in light of the situation described above, to grant the petition, declare the practice in issue impermissible under the supervisory power, and remand to the sentencing court with instructions to impose a sentence that does not take defendant's plea of not guilty into consideration. If the sentencing judge decides that the present sentence did not take that factor into account, he would be free to reimpose the same sentence. See pp. 15-16 *supra*.

**III. There is a direct conflict between this case and *United States* v. *Wiley*, 278 F. 2d 500 (7th Cir. 1960); 267 F. 2d 453 (7th Cir. 1959); 184 F. Supp. 679 (N.D. Ill. 1960).**

In *Wiley*, as here, there were a number of defendants of varying degrees of culpability. In *Wiley*, as here, the more culpable defendants pleaded guilty and received lighter sentences than the less culpable defendant who pleaded not guilty and stood trial.[42] In *Wiley*, as here, the trial judge did not say he was punishing the defendant who stood trial for exercising his constitutional rights;[43] the trial judge there asserted that he was merely withholding from the defendant who stood trial the "leniency" which he showed those defendants who gave "their full cooperation" to the government. 184 F. Supp. 679, 685, 687. In *Wiley*, however, unlike here, the Court of Appeals for the Seventh Circuit "reject[ed] the theory that a person may be punished because in good faith he defends himself when charged with a crime"; the court there "set aside" the sentence, remanding the case to the district court "for a proper sentence not inconsistent with the views herein expressed." 278 F. 2d at 504. In this case, the identical argument was explicitly presented to the Court of Appeals for the Second Circuit (citing *United States* v. *Wiley*). In rejecting this argument (without discussion) the Second Circuit placed itself squarely in a conflict with the Seventh Circuit which requires resolution by this Court.

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[42] In *Wiley* one of the defendants who pleaded guilty and received a lighter sentence was characterized as the "ringleader", 278 F. 2d at 502; here the defendants who pleaded guilty were characterized as the "chief culprits".

[43] *United States* v. *Wiley*, 184 F. Supp. 679, 685 (N.D. Ill. 1960).

In addition to this square decisional conflict between two important Courts of Appeals, there is also a widespread conflict among federal sentencing judges as to the propriety of the practice of imposing more severe sentences on defendants who stand trial. A recent survey of 140 federal district judges disclosed, for example, that 93 did consider the defendant's plea in imposing sentence, while 47 did not.[44] Judicial discussions at Sentencing Institutes confirm this conflict.[45] Since an important conflict over the propriety of sentencing criteria exists at the point in the process where these criteria are applied,[46] and since this important con-

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[44] Comment, 66 Yale L.J. 204, 206-207 n. 17, 222 n. 94 (1956); see note 20 *supra*.

One consequence of these differing judicial views is the unequal treatment that individual defendants receive depending on whether the particular sentencing judge regards the practice as permissible.

[45] Pilot Institute on Sentencing, 26 F.R.D. 231, 285-289 (1960).

[46] It is, of course, possible that even if the Court prohibits the practice in question some judges may continue to follow it *sub silentio*. Our judicial system rests, however, on the proposition that judges will obey the law, and we must assume that if this Court explicitly prohibits the practice, the vast majority of federal judges will stop engaging in it. The significant fact is that this Court has never explicitly passed on the propriety of this widespread and deleterious practice. In *Marder* v. *Massachusetts*, 377 U.S. 407 (1964), appellant asked the Court to consider the constitutionality of a state legislative scheme which authorized a $3 fine for illegal parking if the defendant disposed of his case on "an administrative basis," and a fine of $25 if he insisted on "judicial determination of his guilt." The highest state court had justified this "simple and convenient procedure for the disposition," of "trivial" violations, as a method of freeing violators "from inconvenience disportionate to the gravity of their offense." *Commonwealth* v. *Marder*, 346 Mass. 408, 409-411, 193 N.E. 2d 695, 696 (1963). Moreover, appellant had failed properly to raise the federal question in the state courts. (Brief for appellee on Motion to Dismiss pp. 2-5). Thus, the Court's dismissal of the appeal without opinion (three Justices dissenting) cannot be said to constitute a holding that it is permissible to impose a harsher penalty on a defendant in a serious federal case because he has exercised his right to plead not guilty and stand trial.

flict is unlikely to be resolved at the circuit court level,[47] this Court should grant certiorari and decide whether it is proper for a federal sentencing judge to impose a harsher sentence on a defendant because he has exercised his constitutional right to plead not guilty and stand trial.[48]

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[47] As previously noted, this issue is rarely presented squarely to an appellate court, since sentencing judges do not often articulate the reasons behind their sentencing decisions. See pp. 15-16 *supra*.

[48] The Government, in a footnote to its brief in the Court of Appeals (p. 100 n. *) noted that defendant did not make a motion for resentencing under Rule 35 of the Federal Rules of Criminal Procedure. The Government gave no arguments as to why the defendant should have made such a motion, but in order to lay at rest any doubts that may arise on the matter, we will indicate why a Rule 35 motion was not, and indeed could not have been, taken.

The sentencing judge, in response to a request to reconsider its sentence, specifically indicated that "the court has had a tortured time for the last two weeks with this case, *and the court will not reconsider its determination*". (R. 2900) In light of this unequivocal declaration, it would have been pointless to go through the motions of asking for resentencing through a formal motion. Rule 35 was meant to expedite the administration of justice, not to encourage "wasteful circuity." Compare *Heflin* v. *United States*, 358 U.S. 415, 418 n. 7 (1959). Moreover, a motion under Rule 35 would not have been proper since an appeal was pending. As stated by 8 Moore's Federal Practice §35.02[1] (2d ed. Cipes 1966):

> "Rule 35 encompasses two forms of relief—reduction of sentence and correction of an illegal sentence. Both forms . . . (3) *prohibit it from acting during the pending of an appeal.*"

In this case, defendant appealed to the Circuit Court and has continued his appeal by seeking a writ of certiorari.

The rule does permit the correcting of an illegal sentence "at any time," and this could possibly be read to include a time when an appeal or a request for certiorari is pending. But as stated by one court with respect to the similar language in 28 U.S.C. §2255 that "A motion for such relief may be made at any time":

> "[B]oth reason and policy would seem to dictate an implied condition that where, as here, the judgment sought to be set aside is under review in an appellate court, such a motion may not be entertained by the trial court in the absence of direction from the appellate court in which the appeal is pending."

*United States* v. *Kobey et al.*, 109 F.Supp. 687, 688 (S.D. Cal. 1953).

## CONCLUSION

**For the foregoing reasons, this petition for a Writ of Certiorari should be granted.**[49]

Respectfully submitted,

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October 18, 1966

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[49] On October 18, 1966, a petition for a writ of certiorari was filed on behalf of co-defendant Nathan Sharff. His petition raises the following questions:

1. Did the Court below err in ruling that the evidence was legally sufficient to establish that the cultures and documents here involved were of the value of $5,000. or more within the meaning of 18 U.S.C. Sec. 2314?

2. Did the Court below err in ruling that the transportation of papers describing the Lederle processes constituted the transportation in interstate or foreign commerce of "goods" which had been "stolen, converted or taken by fraud" within the meaning of 18 U.S.C. Sec. 2314?

3. Where co-defendants pleaded guilty and their sentencing was deliberately delayed at the behest of the government for three years and until after they had testified against petitioner, was petitioner deprived of a fair trial under the Fifth Amendment to the Constitution?

If Sharff's petition is granted, we request the Court to grant Salb's petition as well, since the record in Salb's case raises these questions as well. Indeed, in one significant respect, the record for reversal is stronger as to Salb than Sharff. In affirming the conviction, the Court of Appeals accepted the Government's alternative argument that even if the papers did not constitute "goods", (see question 2 above) "count 9 charged only transportation of a stolen CTC culture which the jury necessarily found worth the statutory minimum in convicting *Sharff* and *Bottone* and in view of the concurrent sentences we need go no further as to them." (A-9, emphasis supplied). But count 9 was *dropped* as to petitioner Salb; thus the Government's alternative argument has no application whatever to Salb.

* Research for this petition was also done by Robert Winter and Jack Litman, third-year students at the Harvard Law School.

# APPENDIX A

## Opinion of United States Court of Appeals

### UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 436—September Term, 1965.

(Argued June 23, 1966 Decided August 4, 1966.)

Docket No. 30343

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

CAESAR BOTTONE, SEYMOUR SALB, and NATHAN SHARFF,

*Appellants.*

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Before:

MOORE, FRIENDLY and FEINBERG,

*Circuit Judges.*

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Appeals from a judgment of the District Court for the Southern District of New York, Charles M. Metzner, *Judge*, convicting defendants, after a verdict, of interstate and foreign transportation of cultures and documents stolen, converted or taken by fraud in violation of 18 U. S. C. §2314, and of conspiring to do so in violation of 18 U. S. C. §371. Affirmed.

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MOSES POLAKOFF, New York, N. Y. (Van Riper & Belmont, Newark, N. J.; Walter D. Van Riper, of Counsel; Theodore M. Wolkof, New York, N. Y., on brief), *for Defendants-Appellants Salb and Sharff.*

ALFRED DONATI, JR. (Zoloto, Karger & Zurkow, New York, N. Y.; Arthur Karger, of Counsel), *for Defendant-Appellant Bottone.*

DANIEL R. MURDOCK (Robert M. Morgenthau, United States Attorney for the Southern District of New York; John S. Martin, Jr., Stephen F. Williams, John E. Sprizzo, Assistant United States Attorneys), *for the United States of America.*

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FRIENDLY, *Circuit Judge*:

The convictions here under appeal stem from a scheme for the massive extraction from Lederle Laboratories, a division of American Cyanamid Company located in Pearl River, N. Y., of microorganisms used in the production of three antibiotics and a steroid,[1] and instructions for the drugs' manufacture. Although the drugs were covered by patents and specimen cultures were required to be deposited in collections available for purchase by the public at minimal cost, improved strains of the microorganisms and detailed manufacturing processes developed by Lederle which

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[1] The antibiotics were tetracycline (TC), sold as Achromycin; chlortetracycline (CTC), sold as Aureomycin; and demethylchlortetracycline (DMCTC), sold as Declomycin. The steroid was triamcinolone, sold as Aristocort.

were not in the public domain offered vastly greater output from the same physical plant. The combination of this with the lack of patent protection in certain foreign countries created a market for stolen cultures and secret processes and furnished a substantial incentive for theft to disloyal employees and persons willing to do business with them. The enterprise that was the subject of this indictment involved stealing and preserving cultures Lederle had developed, temporarily removing and copying documents that outlined manufacturing procedures, and then selling the cultures and the copies primarily for ultimate exportation to Europe. As in so many criminal trials, the Government's case was presented mainly through the chief culprits, two former Lederle employees, Sidney Fox and John Cancelarich, and their lieutenant, Leonard Fine, all of whom pleaded guilty to the charges against them and were rewarded for their cooperation with light sentences of six months' imprisonment.[2] The serious crimes charged against the appellants, Salb, Sharff and Bottone, were on the receiving end.

The trial was in the District Court for the Southern District of New York before Judge Metzner and a jury. The counts submitted, on which appellants were found guilty and given two-year concurrent sentences, were in summary as follows:

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[2] Joseph Gerace, a lesser accomplice, who also testified for the Government, received a suspended sentence.

| *Number* | *Charge* | *Appellants* |
|---|---|---|
| 1 | Transporting CTC cultures and related documents from Spring Valley, N. Y., to East Paterson, N. J., on November 11, 1959. | Salb<br>Sharff |
| 8 | Transporting TC, CTC, DMCTC and triamcinolone cultures and related documents from New York to Rome, Italy, on April 16, 1961. | Bottone<br>Salb<br>Sharff |
| 9 | Transporting CTC culture from New York to Milan, Italy, on September 15, 1961. | Bottone<br>Sharff |
| 10 | Conspiracy to steal, transport and sell cultures and related documents from March 1958 to July 1964. | Bottone<br>Salb<br>Sharff |

Appellants' prolix briefs reargue the evidence in a manner that would scarcely be convincing to a jury and is wholly misplaced before an appellate court. Counsel ought to understand the futility of tedious efforts to show that each piece of testimony is suspectible of an innocent interpretation if it stood alone. The trier is entitled, in fact bound, to consider the evidence as a whole; and, in law as in life, the effect of this generally is much greater than of the sum of the parts. Cf. *United States* v. *Monica*, 295 F. 2d 400, 401-02 (2 Cir. 1961), cert. denied, 368 U. S. 953 (1962). Indeed we find simply frivolous the attempt to

demonstrate insufficiency by Salb and Sharff, who, as proprietors of Biorganic Laboratories of East Paterson, N. J., had begun illicit dealings with Fox in stolen Lederle cultures as early as the winter of 1958, continued their purchases of microorganisms and documents for more than two years; and then switched their custom to Cancelarich after he had acquired most of Fox' collection of Lederle cultures and records. Although Bottone entered the conspiracy at a later stage and the Government adduced no direct testimony that he had heard the cultures and documents described as stolen from Lederle, the evidence of his participation in discussions as to disposition of the goods and of his substantial role in facilitating transportation abroad of both cultures and participants, which we summarize in the margin,[3] amply met the Government's burden. To

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[3] Bottone's first significant appearance was in June 1960 when Sharff and Salb were endeavoring to persuade Fox it would be dangerous for him to sell the stolen materials by himself. They placed a fake advertisement seeking information in a trade paper under the name of a Dr. Angelo Mancuso, with the address of Sharff's brother-in-law. Fox answered the ad and met in London with a business associate of Bottone, Salvetti, who masqueraded as Dr. Mancuso. Salvetti telephoned Bottone who was then in Italy and, saying he had just met with a group that had closed a big deal which he had to stop, asked Bottone to cable him in London that Interpol was investigating the theft of Lederle trade secrets. Bottone sent the cable, left for London in the middle of the night, and secretly observed Salvetti show the cable to Fox. Afterwards Salvetti told Bottone he wanted to stop Fox' deal so that he might offer the same information and microorganisms at a lower price. In March 1961 Bottone had a visit in Berlin with Wawretschek, head of a Milan pharmaceutical firm, Ankermann, which had been a purchaser of the stolen cultures and processes; Wawretschek complained about the quality of the microorgansims and suggested a new deal whereby Salb, Sharff, Salvetti and Bottone would buy into his company. Bottone telephoned this proposal to Salvetti in Rome; on April 10 the American group executed a purchase contract in New Jersey, with Salvetti signing in Bottone's behalf. On April 14 Fine and Salvetti drove Cancelarich from Salvetti's apartment in Bronxville, N. Y., to Biorganic to discuss Cancelarich's employment at Ankermann with Salb, Sharff and Bot-

hold that the jury could not be convinced from all this evidence of his comings and goings that Bottone knew what was about, would require a greater degree of credulity than even such "naif, simple-minded men" as appellate judges, see Holmes, Collected Legal Papers 295 (1920), can be expected to possess. And we are wholly unimpressed by the criticisms now made of the judge's summary of this evidence, to which counsel took no exception at the time. See *United States* v. *Kahaner*, 317 F. 2d 459, 478-79, 482 (2 Cir.), cert. denied, 375 U. S. 836 (1963).

The only serious point of law raised by appellants is whether the transportation of papers describing the Lederle processes constituted the transportation in interstate or foreign commerce of "any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converetd or taken by fraud."

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tone. Cancelarich made a full revelation of his own thieveries and his possession of Fox' collection of Lederle cultures and processes, but it was not proved that this was heard by Bottone, who arrived late. Two days later Bottone drove Cancelarich from Fort Lee, N. J., to Kennedy Airport and bought him a ticket to Italy; Cancelarich carried stolen cultures and papers describing Lederle's processes. Bottone subsequently flew to Milan and in May introduced Cancelarich to a Dr. Marpurgo, representing a Milan firm called MIBA, who was interested in buying a DMCTC process. Cancelarich promised to furnish this for $60,000, which he agreed to split with Bottone who said he would split his share with Salvetti. The culture and processes furnished MIBA were stolen from Lederle. Somewhat later Bottone drove Fine, equipped with stolen Lederle cultures and documents destined for Ankermann, from New Jersey to Kennedy Airport and bought him a ticket to Italy. Fine and Marpurgo subsequently reported to Bottone's MIBA's success with the processes supplied by Cancelarich. In July Bottone financed a trip to Italy for Fine whom he asked to collect $2,000 of his share from Marpurgo. Finally, in September 1961 Bottone, at Sharff's request, took a CTC culture from New York to Milan for delivery to Wawretschek, telling him that the package contained strains coming from Fine.

18 U. S. C. §2314. The problem is not any doubt on our part that papers describing manufacturing procedures are goods, wares, or merchandise, as was held with respect to geophysical maps in *United States* v. *Seagraves*, 265 F. 2d 876 (3 Cir. 1959), and *United States* v. *Lester*, 282 F. 2d 750 (3 Cir. 1960), cert. denied, 364 U. S. 957 (1961). Neither do we have any concern over the value of these papers, since we dismiss out of hand the contentions that secret processes for which European drug manufacturers were willing to pay five and six figures and in whose illicit exploitation appellants eagerly invested a large portion of their time and an appreciable amount of their fortunes were not worth the $5,000 required to subject them to federal prosecution, see *United States* v. *Schaffer*, 266 F. 2d 435, 440 (2 Cir. 1959), aff'd, 362 U. S. 511 (1960), or that the judge committed any prejudicial error in his submission of that issue to the jury. If *Abbott* v. *United States*, 239 F. 2d 310, 312-13 (5 Cir. 1956) is to be considered as ruling out evidence of value in a thieves' market, we prefer the contrary Third Circuit holdings in *United States* v. *Seagraves, supra*, 265 F. 2d at 880, and *United States* v. *Lester, supra*, 282 F. 2d at 754-55. The serious question is whether, on the facts of this case, the papers showing Lederle processes that were transported in interstate or foreign commerce were "goods" which had been "stolen, converted or taken by fraud" in view of the lack of proof that any of the physical materials so transported came from Lederle's possession. The standard procedure was for Fox and Cancelarich to remove documents from Lederle's files at Pearl River, N. Y., take these to Fox' home within New York state, make photocopies, microfilms or

notes, and then restore the purloined papers to the files; only the copies and notes moved or were intended to move in interstate or foreign commerce. The case differs in this respect from the Third Circuit cases of *Seagraves* and *Lester* where, as the records on appeal show, the photostats and tracings delivered by the Gulf Oil geologist were the property of the company, having been made in the company's office, on its paper and with its equipment.

We are not persuaded, however, that a different result should obtain simply because the intangible information that was the purpose of the theft was transformed and embodied in a different physical object. To be sure, where no tangible objects were ever taken or transported, a court would be hard pressed to conclude that "goods" had been stolen and transported within the meaning of §2314; the statute would presumably not extend to the case where a carefully guarded secret formula was memorized, carried away in the recesses of a thievish mind and placed in writing only after a boundary had been crossed. The situation, however, is quite different where tangible goods are stolen and transported and the only obstacle to condemnation is a clever intermediate transcription or use of a photocopy machine. In such a case, when the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial. It would offend common sense to hold that these defendants fall outside the statute simply because, in efforts to avoid detection, their confederates were at pains to restore the

original papers to Lederle's files and transport only copies or notes, although an oversight would have brought them within it. We have been instructed to "free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule," *United States* v. *Dege*, 364 U. S. 51, 52 (1960) (Frankfurter, *J.*), quoting *United States* v. *Union Supply Co.*, 215 U. S. 50, 55 (1909) (Holmes, *J.*). See also *United States* v. *Sullivan*, 332 U. S. 689, 693-94 (1948); *United States* v. *Bramblett*, 348 U. S. 503, 509-10 (1955); *United States* v. *Turley*, 352 U. S. 407, 412-13 (1957). Such considerations have particular force when, as here, the defendants could not have doubted the criminal nature of their conduct, and the sole issue is whether they subjected themselves to punishment by the United States as well as by a state.

Alternatively, we accept the Government's suggestion that the judgment may stand even if the statute does not reach far enough to include the copies and notes. Each count included and the evidence showed the transportation of cultures which were stolen "goods" on any view. The problem whether the copies and notes of Lederle documents were also within the statute arises only because substantive counts 1 and 8 and conspiracy count 10 charged the transportation both of cultures and of documents and the jury made no finding that the cultures alone were worth $5,000, although it would have been quite justified in doing so. But, says the Government, count 9 charged only transportation of a stolen CTC culture which the jury necessarily found worth the statutory minimum in convicting Sharff and Bottone and in view of the concurrent sentences we need not go further as to them. And Salb's conviction

should also stand since the transportation of the culture charged in count 9 was in furtherance of the conspiracy alleged in count 10 and the journey was one of the overt acts. In accepting this argument here we would not wish to be understood as giving all-out obeisance to the validation of concurrent sentences by the presence of one or more good counts, see *Lawn* v. *United States,* 355 U. S. 339, 359-62 (1958); despite frequent reliance on this principle where appropriate, we adhere to Judge Clark's statement that we will reverse for a material error on another count "whenever the nature of the error committed below or other circumstances suggest that the accused might have received a longer sentence than otherwise would have been imposed, or that he has been prejudiced by the results of the proceedings." *United States* v. *Hines,* 256 F. 2d 561, 563 (2 Cir. 1958); cf. *United States* v. *Barash,* —— F. 2d ——, —— (2 Cir. 1966). But this is not such a case. The error —if there was one—went only to including the papers in the determination of value under counts 1, 8 and, by reference, the conspiracy count, and, as said in *United States* v. *Schaffer, supra,* 266 F. 2d at 440:

> "The only reason for the $5,000 limitation is to avoid overtaxing the Department of Justice. There is no legitimate interest of [defendants] . . . which the Congress sought to protect by this requirement."

We have not the slightest question that the jury would have properly convicted on all counts if only the transportation of cultures had been charged, and the papers had been relied on simply as demonstrating the scope of the criminal enterprise and as enhancing the value of the microorgan-

isms. Judge Metzner's remarks on imposing sentence show that he viewed defendants' activities as a whole, and the two-year concurrent sentences were modest as compared to the permitted maximum of ten years imprisonment, a $10,000 fine, or both, on each substantive count, 18 U. S. C. §2[illegible]4, or the five years imprisonment, $10,000 fine or both, on the conspiracy count, 18 U. S. C. §371.

The only other point meriting discussion, and that somewhat questionably, is Bottone's objection to the Government's being allowed to use a deposition and a memorandum of further interrogatoin in a civil action. Merck & Co. had obtained a consent judgment of $100,000 in the District Court for New Jersey against Bottone for infringement of its patent on Vitamin B-12. In May 1962 it entered into an agreement, amended a month later, whereby it would accept $15,000 in satisfaction of the judgment if Bottone would give a "frank and complete disclosure in depositions under oath of all matters and things" within his knowledge on a specified list of subjects. Bottone claims that government investigation had "focused" upon him before the bulk of the interrogation, see *Escobedo* v. *Illinois*, 378 U. S. 478, 490 (1964), that his answers were extracted by pressure and subterfuge on the part of Merck's New Jersey attorney who also represented American Cyanamid in that state, and that much of the interrogation was conducted without Bottone's counsel being present. Therefore, he insists, use of his answers at trial should have been barred as in violation of Fifth and Sixth Amendment rights, or that at least he should have been given a hearing to prove that Merck's lawyer was acting in part at the Government's behest.

Putting to one side the Government's substantial claims that these points were not sufficiently raised below, we find them wholly without merit. In no conceivable way was Bottone "compelled . . . to be a witness against himself." He freely consented to the interrogation, for his own benefit, to rid himself of a liability for $85,000; if the questioning touched on matters tending to incriminate him, he was free to claim the privilege on penalty only of foregoing the financial advantages that performing his agreement to talk would entail. Since he was not in custody, the rules laid down in *Miranda* v. *Arizona*, —— U. S. —— (1966), have no application even if Merck's attorney were working with the Government—quite apart from this having been a pre-*Miranda* trial. See *Johnson* v. *New Jersey*, —— U. S. —— (1966). In any event, not only is it fairly inferable that Bottone had the advice of counsel when he signed the agreement with Merck but a lawyer was present during half the civil interrogation and there was nothing to prevent one from assisting throughout if Bottone had wished. Moreover, in contrast to *Massiah* v. *United States*, 377 U. S. 201 (1964), no "criminal prosecution" against Bottone had been commenced at the time of the questioning, and *Miranda* appears to teach that the references in *Escobedo* v. *Illinois*, *supra*, to the need for counsel in the period prior to initiation of the criminal process were solely concerned with the need for a lawyer to counteract the coercion thought to be inherent in in-custody interrogation.

Affirmed.

# APPENDIX B

## Minutes of Sentence

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

64 Cr. 648
64 Cr. 963

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UNITED STATES OF AMERICA

vs.

CAESAR BOTTONE, et al

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Before:

HON. CHARLES M. METZNER,
*District Judge.*

New York, January 20, 1966

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STENOGRAPHER'S MINUTES

(2913)

Present:

Mr. Martin,
Mr. Murdock,
Mr. Novok,
Mr. Polakoff,
Mr. Van Riper,
Mr. Chapman,
Mr. Howell,
Mr. Bauman,
Mr. Brown.

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Mr. Polakoff: We have the matter of the motions open, your Honor.

The Court: You may make your motions now.

Mr. Polakoff: Your Honor, I move to set aside the verdict and for a new trial on all the grounds stated by the defendants at the end of the government's case, and at the end of the entire case as if they were fully set forth now again.

The Court: Motion denied.

Mr. Van Riper: With regard to the defendant Sharff, I ask to be associated with the motion that Mr. Polakoff has just made.

The Court: The motion is denied.

(2914) Mr. Novok: On behalf of the defendant Bottone, I ask to be associated in the motions made by my colleagues in behalf of their respective clients and I respectfully repeat all motions heretofore made at the end of the government's case and at the end of the entire case, and I now respectfully move that the verdict of the jury be set aside and a new trial be ordered or, in the alternative, that a judgment of acquittal be entered by the Court.

The Court: All the motions you just made, Mr. Novok, I deny.

Mr. Novok: Exception.

The Clerk: Defendant Seymour Salb, please rise.

The Court: Mr. Martin, do you have anything to say before the Court imposes sentence upon the defendant Salb?

Mr. Martin: Yes, your Honor. I know your Honor has presided at the trial and is fully familiar with the facts as they were developed during the course of that trial. You know the nature of the theft that was involved. I would

merely point out to your Honor that whereas the government in its proof at trial limited, for example, its testimony (2915) to the value of these cultures and processes to the American Cyanamid Company to certain narrow issues, it should be brought to your attention that the records of American Cyanamid Company which were presented to me indicated that that company spent over $24 million in developing and improving the cultures and processes that were part of this case. Certain of that value was, of course, given up when they surrendered these cultures and processes to the Patent Office to obtain patent protection, but a good deal of that value was represented in the processes and the cultures which these defendants stole and transported to Italy.

With respect to the defendant Salb, there is no question that the defendant Sharff carried on the business activities of Biorganic Laboratories Company. However, I think the evidence before your Honor indicates that the defendant Salb was totally aware of the illegal nature of those activities and was a full participant in them. It was Mr. Salb who brought Dr. Fox and Mr. Sharff together. He actively participated in the transfers of stolen triamcinolone and the CTC cultures. He was also a party to the attempt to get Mr. Siegfried Muller to (2916) steal additional cultures from the Lederle Laboratories.

In addition, your Honor, to the matters that were directly before you in this case, you may recall that during the course of the trial I attempted to avoid as much as possible any reference to the question of vitamin $B_{12}$ in order that no prejudice be interjected before the jury. However, at the time of sentence, when I know your Honor is trying to

determine the character of the defendant, I think it should be brought to your attention the fact that Sharff and Salb were engaged in a similar transaction to that involving the CTC andDMCTC with regard to vitamin $B_{12}$.

The Court: Pardon me, Mr. Martin. You are not going to recite a series of facts to me upon which the defendants have not been able to answer, are you?

Mr. Martin: Well, I did intend to bring to your Honor's attention that there is this other circumstance, yes.

The Court: Do you want me to conduct a trial? The defendant would deny it.

Mr. Martin: But I think this is a matter which could properly be considered.

The Court: I don't think so, Mr. Martin.

(2917) I have asked the probation office many times never to put that type of material in my probation reports. These are charges which have not been leveled against the man in open court, charges which that person has not been able to answer in open court, and I will not take such charges into consideration in imposing sentence.

Mr. Martin: Then, your Honor, to summarize briefly the matters that were brought out during this trial, I think that the evidence clearly showed that he was an active participant in an illegal venture fully knowing the scope. He has indicated no remorse for the crime of which he stands convicted.

The Court: Mr. Polakoff, do you have anything to say before I impose sentence upon this defendant?

Mr. Polakoff: Yes, your Honor. As far as the facts in the case, your Honor, we all have to accept the jury verdict, and I believe that no one is more familiar with the testi-

mony than your Honor. I just want to point out that based upon the government's testimony Biorganic really was a small cog in this scheme of stealing and transporting these micro-organisms. You have heard all the other names mentioned (2918) and I am not going to repeat them, all the other large companies that were involved. You have heard the part that Salb played in that matter.

I just want to address myself, your Honor, to the fact that on Salb's part there was no violation of employer-employee ethics; that he didn't steal any antibiotics or the organisms from which they are made and that he did, according to the jury verdict, receive property that had been stolen. No profit was derived from it. In fact, all the testimony indicated that the venture was practically a total loss.

Your Honor is familiar through the probation report, of course, which counsel has not seen, about his family life, his character and his past history. He has been in business in Biorganic for twenty years and I have been informed that they never were charged with any Food or Drug violation or any other violation dealing with the drug industry.

I submitted to your Honor on Tuesday morning to your secretary a couple of hundred character letters. These all came from the community in which he resides. It was a voluntary act on behalf of people of the community who formed committees, (2919) who interviewed people and obtained these letters.

Your Honor can realize it would be impossible for the defendant himself to obtain the array of character letters that were submitted to you. It is Salb's first offense. He has never been in trouble. He has been a good citizen, other than for this incident here. He is a family man and, as I

pointed out to your Honor, it was an unfortunate venture through which no profit was derived, and I trust your Honor will be as lenient as the circumstances warrant in your opinion.

The Court: Mr. Salb, do you have anything to say before the Court imposes sentence upon you?

Defendant Salb: No, your Honor.

The Court: I will pass on to the next defendant, Mr. Sharff, before the actual imposition of sentence.

The Clerk: Nathan Sharff, please.

The Court: Mr. Martin.

Mr. Martin: If your Honor pleases, at the trial the government's evidence showed the defendant Nathan Sharff was not a man who merely took advantage of an illegal situation which presented itself to him but that he sought out this situation, developed (2920) it. He was a moving factor in the conspiracy. He sought out the outlets for the stolen triamcinolone. He sought out the outlets for the cultures and processes that had been stolen from Lederle Laboratories. This was a profitable venture for the defendant Sharff. He sold approximately two thousand grams of triamcinolone for approximately $30 a gram. He would have paid $10 a gram for it. He received $130,000 from Mr. Wawretschek on the sales of cultures and processes involved in this case, so it was certainly a very profitable venture from his point of view.

In addition, your Honor, there is nothing to indicate that the defendant Sharff has any remorse for the crime that he committed. In fact, it is evident from the course of this trial that he attempted to make use of perjured testimony to secure his acquittal on this charge. The testimony of Mr.

Kevan, which was offered on behalf of the defendant Sharff, was, under your Honor's instructions to the jury such that if it was not believed—

The Court: That doesn't mean it is perjured testimony, Mr. Martin, if they don't believe it. That means that every person who loses a case in this court (2921) is a perjurer. Isn't that true?

Mr. Martin: Not necessarily, sir.

The Court: I don't consider Mr. Kevan was a perjurer. When you make charges of that type, Mr. Martin, you are making very serious charges which involve an individual's fundamental rights. You can't label Mr. Kevan a perjurer —he has never been tried for perjury—and then say that you consider him a perjurer and therefore I must attribute to Mr. Sharff that he put perjured testimony on the stand. I won't do it.

Mr. Martin: I submit to your Honor that there is nothing to indicate that Mr. Sharff has any remorse for the crimes which he stands convicted. I submit the evidence of that guilt was overwhelming in that case.

The Court: I may add, Mr. Martin, that if you think Mr. Kevan's testimony was perjured I think you have a duty to have a grand jury investigation of it.

Mr. Martin: Yes, sir, I agree with your Honor.

The Court: Mr. Van Riper.

Mr. Van Riper: May it please your Honor, (2922) I hope that I have some realization of the problem which confronts the Court at this time, as in every case. I realize there are many things that have to be taken into consideration, and despite our original plea of innocence the jury decided otherwise and we have to accept this as a fact at

this moment and for the purposes for which we are now here.

Your Honor has disposed very quickly of the district attorney's reference to $B_{12}$ and to perjury, but I can't help but be shocked to think they would be referred to. There has never been any indictment on $B_{12}$ whatsoever so far as this defendant is concerned.

If your Honor please, your Honor, of course, is fully familiar with the testimony as it was developed at the trial. I don't recall any testimony which would indicate that Mr. Sharff received $130,000, as the district attorney says he did. There was some testimony of payments by Wawretschek, it is true, but I don't recall any testimony which shows that any money in anything like that amount went to this defendant Sharff. There isn't any question but what they were engaged in an illegal and immoral activity. There isn't any question about that. Sharff did not (2923) initiate it. He didn't go to Lederle or to Lederle employees. A Lederle employee came to him.

Now, I appreciate the fact that it can well be said that if it weren't for those who had disposed of it afterwards that there would not be any thieves in the first instance. That is true. But Sharff, as Mr. Polakoff has said with reference to Salb, did not violate any relationship which existed between him and Lederle. He did not practice disloyalty or deceit in that regard.

Now, the evidence showed they carried on an activity and obviously carried it on for the purpose of attempting to make at least a profit, but I don't recall that there is any evidence that showed that he made any real profit of any consequence whatsoever. The fact is that today, as

I assume the probation report will show to your Honor and has already shown to your Honor, that Sharff is practically without any resources except the little home which he owns, and I think that is encumbered by a mortgage.

The district attorney made mention of the fact or made the statement that Mr. Sharff has not shown any remorse. Well, I don't quite know where he would be supposed to show that remorse, if your Honor (2924) please. If the district attorney had the experience with him that I have had in the last weeks and months he would have seen plenty of evidence of remorse. There has been no other place where Mr. Sharff could have shown it.

It is true that he has not testified for the government. It is true that he has not made any confession. He has to rely on the testimony as it was produced and he has not taken the stand to deny it and has not in any way committed any other offense. If one is to be punished for going to trial, I don't think that is quite in accordance with our present-day method of the administration of justice.

Sharff went to trial, as he had a perfectly legal right to do. He went to trial. He had a perfect right as a citizen and as a defendant in a criminal case to put the government to its proof. Now, I appreciate the fact that there are situations where it can be said: Well, the man didn't go to trial. He pleaded guilty. He saved the government the expense of trial, whereas this man by going to trial, it may be said, cost the government the expense of a trial. That is probably true, but I think that is the cost of the administration of justice as we have (2925) it in this district and in this country today. Perhaps he should bear

some part of the expense of that trial. I don't know. That is a matter, of course, for your Honor to decide.

I am sure the probation report has shown to your Honor that with the exception of this offense Sharfff has lived a decent, clean life. Several letters from his neighbors and fellow townsmen have been submitted to your Honor. I think the answer to that always is: You thought he was a fine man. You thought his character was good, but he committed this offense and the jury found that he committed this offense. That is true. The letters written are indicative of the fact that he had lived a decent life as a decent citizen and as a decent family man. He has a wife, and I think the probation report shows that since she testified at the trial she has been helping to keep the family by working as a school teacher, a position she fortunately has. They have two children, a boy and a girl, both of whom are in college.

There are many things to be considered in the imposition of sentence. The law must be vindicated. I think the law is vindicated in this (2926) case or in any other case when a conviction has been secured. That in itself vindicates the law.

Then there is the defendant who has to be considered, and then there is society as such. Society includes a man whose property has been taken or has been injured and he has a right to be protected against a repetition of that either by this defendant or by some other defendant, and other members of society who own property have a right to feel they have protection against it being taken away from them or against it being used improperly. It seems

to me that the mere fact of a conviction goes a long way towards securing that right.

Now, the defendant himself and his family are a part of society and I know that at this juncture of the proceedings the question also arises as to whether there shall be a jail sentence or shall there not be a jail sentence. I have often wondered, if your Honor please, except in the case of one who is of a vicious character and of such a nature that for the presentation of his fellow men he has to be put away, whether or not putting people in jail really accomplishes anything or really serves any purpose. In a case of this kind, I doubt very much if (2927) it would, sir. It seems to me that if a sentence was imposed here and the execution of it suspended and the defendant placed on probation for a substantial period of time, that the result would be much more satisfactory to society. His wife and children would not have to have the stigma—and they already have one stigma, that of having their husband and father convicted—they would not have to have the stigma of having their husband and father in prison. When his time was up, if he were in prison and came out, what would he do? How he would then overcome the difficulties that had been imposed upon him I don't know.

Incidentally, I have submitted to your Honor a letter from Mr. Sharff's physician showing what his physical condition is, and without repeating what is in the letter, because your Honor has it, it indicates, as your Honor knows, that his physical condition is not a good one. I submit that under all the circumstances, weighing all of the equities and charging us with all the debits which we are entitled to be charged with, and we must be charged

with them here at this stage of the proceeding so that society will be served, that the law would be vindicated and (2928) that justice would be done by some sort of a sentence other than actual confinement.

The Court: Mr. Sharff, do you have anything to say before the Court imposes sentence?

Defendant Sharff: No, your Honor.

The Court: Call the next defendant.

The Clerk: Caesar Bottone.

Mr. Martin: Your Honor with respect to the defendant Bottone, your Honor heard his testimony at the trial. There is one matter I would point out to the Court and that is that there was mention at the trial that the defendant Bottone had been previously convicted of a violation of the Food and Drug Act that was characterized by defense counsel as merely a technical violation. The government would not concede that. I don't know how your Honor's prohibition with regard to other matters —

The Court: It is a matter of record.

Mr. Martin: —on which Mr. Bottone was convicted—the evidence at the trial did indicate that a drug being shipped was hydrochlorothiazide, which is a patented item, and the evidence at the trial showed that that drug had been imported from the country of Italy as procaine hydrochloride, a nonpatentable (2929) drug, which bears a minimal duty, whereas hyrochlorothiazide bears a substantial duty. There was smuggling involved in that as well as a violation of certain patent rights of others.

There was at the trial some reference, your Honor, and here again I don't know how your Honor's prohibition

would run, but I do feel that defense counsel for Dr. Bottone, in attempting to throw a black color on Mr. Cancelarich, pointed out to the smuggling of certain $B_{12}$ that was brought in through Mr. Cancelarich's request. In fairness to the others, it was at the request of Dr. Bottone that that $B_{12}$ was delivered to Dr. Bottone when it was brought into this country.

With regard to the other matters, your Honor is fully familiar with his participation in this conspiracy from the evidence at this trial.

The Court: Mr. Novok.

Mr. Novok: May it please your Honor, of course we are bound, as the other two defendants are, by the verdict of the jury. However, your Honor will undoubtedly recall that Dr. Bottone pleaded innocent to the charge as leveled against him by the government; that in furtherance of his plea of innocence he took (2930) the witness stand and made a full disclosure of all knowledge which he had concerning this situation, and I respectfully point out to the Court that the evidence in this case did disclose that Dr. Bottone's part in this whole conspiracy was nothing more than being a dupe used by the others. There was no testimony in this case nor did the government seek to offer any testimony that Dr. Bottone had anything whatsoever to do with the actual stealing of organisms or the purloining of the papers or procedures from Lederle; had absolutely nothing to do with the thievery involved among those who had pleaded guilty before him, and his only connection with this situation was that they had transported, without his knowledge, some organisms to Italy. Your Honor will recall, of course, that there was no question of any profit motive to Dr. Bot-

tone; that he did not make one penny out of anything that was going on at this time. He received no money. As a matter of fact, he lost the sum of $42,000 by an unfortunate investment.

Under all of the circumstances as brought out during the course of the trial, sir, we ask that the Court take all of these matters into consideration (2931) in imposing sentence, bearing in mind that at best it might be said in behalf of the government that Dr. Bottone was but a dupe in this entire situation.

The Court: Dr. Bottone, do you have anything to say before the Court imposes sentence upon you?

Defendant Bottone: No, sir.

The Court: Will the defendants Salb, Bottone and Sharff please rise.

I must say the Court has never been deluged with as many letters on behalf of defendants facing sentence as it has in this case. All of the letters state the defendants have suffered enough; that they are intelligent people with families. The intelligence of these defendants, including those who pleaded guilty, is one of the shocking aspects of this case. The purpose of incarceration is not only to act as a deterrent to future criminal action by the defendant but also to act as a deterrent to other people who may have a mind to engage in siimlar criminal activities. The effect of the deterrent to others in this case is manifest where everyone involved holds a doctorate or master's degree and all of you are highly trained and (2932) intelligent people. Now, admittedly you did not steal the processes or the cultures. They were stolen by others who did it on their own, wilfully and knowingly, but you were there to

pick it up. You were there to move it on its way and in some instances even encouraged the other defendants who pleaded guilty to engage in the acts that they were engaged in.

I think I have to be a Solomon to distinguish between the culpability of the three defendants to whom I am now talking. Mr. Sharff, obviously you were the head of this. Your manipulations were like somebody moving chessmen around a board. The string of exhibits and correspondence between you and Cancelarich alone show that.

Mr. Salb, you were part and parcel of it and you knew that it was going on, and so did you, Dr. Bottone, and that midnight ride from Milan to London is one of the unexplained facts in this case.

After reviewing the evidence carefully and taking into consideration all of the factors involved, knowing that none of you are ever going to anything of this type again, but also knowing the right of society to be protected not only against (2933) yourselves but others of like mind and like intelligence who may engage in this type of activity, I will impose a sentence of two years on Mr. Salb and Mr. Sharff and Dr. Bottone.

Mr. Polakoff: Will your Honor fix bail for the appeal?

The Court: Yes.

What is the present bail, Mr. Polakoff?

Mr. Polakoff: A thousand dollars for Mr. Salb.

Mr. Novok: $2500 for Dr. Bottone.

Mr. Martin: And $2500 for Mr. Sharff.

The Court: I will continue the bail.

Mr. Martin: Is that sentence concurrent on each of the counts?

The Court: To clarify it for the record, I impose two years on Mr. Salb on counts 1, 8 and 10 to run concurrently.

I impose a term of two years on Mr. Sharff on counts 1, 8, 9 and 10 to run concurrently.

I impose a sentence of two years on Dr. Bottone on counts 8, 9 and 10 to run concurrently.

I will continue the defendants in the existing bail pending appeal.

(2934) Mr. Van Riper: I have been used to sentences that say in the custody of the Attorney General for two years. Does the notice of appeal have to include—

The Court: The form says that. Do you have the form of sentence, Mr. Martin?

Mr. Martin: No, your Honor. That is one form our office doesn't have.

The Court: The form says he is to be in the custody of the Attorney General.

(2935) The Clerk: John Cancelarich.

Mr. Martin: As to each of the remaining defendants, as your Honor knows they each testified during the course of this trial. Each of them pleaded guilty. The government at the time they began to cooperate told them that no promises could or would be made to them, but, however, that the matter of the extent of their cooperation would be brought to the attention of the sentencing judge for whatever consideration he would give it.

In fulfilling that, your Honor, I would say as to the defendant John Cancelarich, he has cooperated in the course of the investigation and prosecution of this matter from its inception. When he was first questioned about these matters by counsel for Cyanamid he completely admitted

his part in these transactions. Thereafter, during the course of the preparation of the case in this office and the investigation that accompanied that he made himself freely available to government counsel. He testified before the grand jury. In the preparation of this case he made himself freely available to me whenever it was necessary for me to consult with him, which involved often coming down from his home in Maine on weekends, (2936) sometimes on very short notice, and during the course of the trial itself, after the government's case was rested and the defense was put on, it was again necessary to call Mr. Cancelarich down on very short notice to confer with government counsel. (2937) He has always done this willingly. There is no question in the mind of anyone connected with the government that he has fully cooperated with the government during the course of this prosecution.

The Court: Do you represent Mr. Cancelarich, Mr. Bauman?

Mr. Bauman: Yes, sir, I do.

The Court: I thought I had received a letter from Mr. Brown on Mr. Cancelarich.

Mr. Brown: It was for Leonard Fine, if your Honor please.

The Court: Who represents Mr. Fox?

Mr. Chapman: I do, your Honor.

The Court: And Mr. Gerace is represented by Mr. Howell; is that correct?

Mr. Howell: Yes, your Honor.

The Court: You may proceed, Mr. Bauman.

Mr. Bauman: May it please the Court, your Honor has before him a full and complete report by the Probation

Department, I have no doubt. Many of the facts that I intend to put before your Honor must be necessarily contained in that report, nonetheless I think the interests of justice require me to call certain things to your Honor's attention in (2938) connection with the defendant John Cancelarich. That he has committed a crime, there can be no doubt. As you were informed by the United States Attorney, he pleaded guilty immediately upon his arraignment in the indictment, but long before that his cooperation started. As a matter of fact, when this matter first came to the attention of the Cyanamid people, as you were informed by the United States Attorney, they sent someone to see him. From that moment forward and without hesitation John Cancelarich has cooperated to the fullest. I say responsibly and seriously that I have never seen any case of greater cooperation with the government and with the party who was wronged by his action. As a matter of fact, when his lawyer informed him in Italy that the Federal Bureau of Investigation wanted to talk to him, he immediately returned, made himself available to the FBI, made himself available to the United States Attorney and to the grand jury and he testified in the grand jury. That was the beginning of his cooperation.

He has testified in civil suits telling the truth wherever he has gone. As a matter of fact, Judge Aurelio in the Supreme Court of New York County (2939) made a specific finding that the testimony of John Cancelarich was true in a suit brought by Cyanamid against some of the people involved in this matter. He has testified in this case and, indeed, has participated with representatives of Cyanamid, Merck and the government in running down

whatever leads there were and in helping to run down whatever there was to run down always without complaint and always in penitence for what he had done. It is his estimate, and I ask your Honor to take it quite literally, that he has spent since this matter started some 200 days in cooperating.

I respectfully suggest that John Cancelarich has been punished enormously already. As your Honor knows, he, naturally, lost his job with its great possibilities for advancement at Cyanamid immediately. He has obtained other employment, as your Honor must have been informed in the probation report, at which he works very hard and at which he has gained the respect and admiration of his employers and fellow workers. But his future in his chosen profession is, I think we must all admit, permanently limited by his judgment of conviction in this case. As a matter of fact, there is presently a proceeding (2940) brought by the American Society of Chemical Engineers to discontinue his membership.

Your Honor must know, likewise from the probation report, that he has a wife and four small children, all preschool age. I met his wife at the beginning of this case and I know how distraught and distracted she has been throughout this entire matter, and just before John Cancelarich testified before your Honor for the government, the culmination of these years and everything that had happened brought her to a nervous breakdown from which she has just now recovered.

What has John Cancelarich done with his life since this has happened other than cooperate? Your Honor knows that he has obtained a job. Your Honor knows—I say this

because it must necessarily be in the probation report—that he has worked hard and does work hard. Your Honor may not know the full extent of the communal activities in which he has engaged in attempting to resurrect his life in attempting to make himself a useful and contributing member of society, and for that reason I asked if he would write me a letter setting forth some of the community work he does. I wonder if I might have (2941) the court's permission to submit this letter to the court to become part of the court's file, if your Honor pleases, so that I do not have to spread upon the record the many and personal activities in which Mr. Cancelarich has been engaged.

I respectfully submit to your Honor that if contrition, atonement, cooperation and rehabilitation are meaningful to the court in the administration of justice, I respectfully suggest in that event that John Cancelarich has done everything that he can to right the wrong he has done and to earn the consideration of the court. I respectfully submit to you, sir, that in the three and a half years since his indictment he has proved himself, day by day, event by event, in his repentence in his business life and personal life and I respectfully suggest to you, sir, that he stands before you a thoroughly and completely rehabilitated man.

For all these reasons, your Honor, I commend him to the utmost consideration that the court sees fit to extend.

The Court: Mr. Cancelarich, do you have anything to say before the court imposes sentence on you?

(2942) Defendant Cancelarich: No, your Honor.

The Clerk: Leonard Howard Fine.

Mr. Martin: As with Mr. Cancelarich, Mr. Fine has cooperated with the government and with counsel for Amer-

ican Cyanamid in their civil litigation arising from these defendants from the time that he was first contacted by the Cyanamid attorneys. Since that time he has made himself fully available both to government counsel and the Federal Bureau of Investigation as well as Cyanamid counsel whenever it was necessary for the preparation of the cases in which we were involved. There is no question that from the outset he has told all of the facts as he has known them truly and honestly, and this has been corroborated by the other evidence that we have and there is no question in anyone's mind connected with the government, your Honor, that Mr. Fine has given complete cooperation to the extent that he could.

The Court: Mr. Brown, do you have anything to say before I impose sentence on the defendant?

Mr. Brown: Yes. If your Honor please, I have represented Mr. Fine for 39 months and in the course of that time I have gotten to know him and (2943) state that in my opinion I believe that he has rehabilitated himself to a large extent.

There is no question here, your Honor, that a wrong has been done and that a wrong against society must be righted, but I think that, similar to the pattern of John Cancelarich, Mr. Fine has exhibited an extraordinary cooperation in an effort to right that wrong, a cooperation, if your Honor please, not only with the United States but a cooperation with the victims of the wrong, the corporate—

The Court: I'm not the least bit interested in the cooperation with American Cyanamid, Mr. Brown.

Mr. Brown: If your Honor please, your Honor mentioned that one of the shocking factors here was the intel-

ligence of the defendants and, if I may, I would like to comment on that by saying that while Mr. Fine, to my knowledge, has sufficient intelligence to be an able chemist, he has exhibited to me an incredibly naive attitude with regard to the problems that he was involved in, and I believe that in the course of the past 39 months this naivety has been remedied to a great extent. His cooperation with the United States, as Mr. Martin has said, has (2944) said, has been complete. He has, like Mr. Cancelarich, given a tremendous number of days to the intricate facts here, and you have heard Mr. Martin say that there is no question of the truthfulness of what he has disclosed.

I think that it is also fair to call your Honor's attention to the fact, as your Honor sat on this case and was the trial judge, that the cooperation of Mr. Fine with the United States Government was a significant factor in bringing about the indictment. Mr. Bauman mentioned that his client was approached in Italy and immediately returned. I think it is significant that the man who did that and did bring him back was Leonard Howard Fine.

Now, if your Honor please, you also mentioned that those defendants that you just sentenced treated others as chess men. One of these chess men, I submit, was Leonard Fine. His part was a limited and subordinate part out of which he received nothing. He has demonstrated repentence and atonement and I think that I will leave it to the probation report to cover that. I'm certain that it would reflect those factors, since the probation people have visited (2945) Mr. Fine's home each year since the indictment.

I think that Mr. Fine's career as a chemist has been more than seriously impaired. What he has already suf-

fered will be a permanent mark on him for the rest of his life. I think that incarceration, if your Honor please, is uniquely unnecessary in Mr. Fine's case in that I think that he has been rehabilitated. He is not dangerous to society. His incarceration after 39 months, after what he has done and the way he has lived and the way his attitudes have changed would not be a deterrent to others if he were confined. On the other hand, confinement of Mr. Fine would have a harmful effect on his wife, a devoted, intelligent person who has been subjected to this difficulty and his three children, a son, 11, a son, 9, and a daughter, 5 years old. My understanding is that there is no other means of support. To indicate the type of person that Mr. Fine is becoming, the president of the company for whom he works has come here and is ready to take any part in the proceeding your Honor may wish. Mr. Edward Shefferd, the president of Corko Chemical, for which Mr. Fine has worked for three and a half years, is (2946) here and has written your Honor a letter with respect to his character and the way he has operated.

I respectfully urge, then, your Honor, in these unique circumstances that Leonard Fine not be imprisoned. I don't believe that he is a danger to society or that incarceration would rehabilitate him further. He appears to understand the nature of his prosecution. He knows the offensiveness of his prior conduct and he has during the past years sought to be a responsible and law abiding person.

Thank you, your Honor.

The Court: Mr. Fine, do you have anything to say before the court imposes sentence upon you?

Defendant Fine: No, your Honor.

The Clerk: Martin Fox.

The Court: Mr. Martin.

Mr. Martin: With regard to the defendant Fox, his cooperation with the government began in March of 1964. He has given the fullest cooperation possible. He has made himself available to the Federal Bureau of Investigation and to members of the United States Attorney's office and has set forth (2947) fully his participation in these crimes and the extent of the activities to which he has information. Also, your Honor heard his testimony at the trial. He testified fully, admitting all his own faults, all his previous wrongs. I think he was totally candid and has been throughout with the government and the court.

I would just also point out to your Honor as to the testimony of Dr. Fox there can be no question as to its truthfulness at the trial here. It was fully corroborated by other evidence which was produced at the trial.

The Court: Mr. Chapman.

Mr. Chapman: Your Honor, I think I should make known to the court the fact that I'm not an entire stranger to the case, although I appear here for the first time on behalf of Dr. Fox. Originally he came to me but because of commitments I couldn't undertake to represent him and this was long before anything happened which resulted in his incarceration in a civil jail for some seven months. I did not represent him at that time, and his incarceration resulted either from poor advice or his own inability to understand his (2948) position. However, he did come to an understanding of it and, as Mr. Martin pointed out to you, his cooperation with the government has been considerable.

I do not know very much about the facts in the case except as I have gleaned them from some remarks when I had a conversation with Mr. Murdock as to Dr. Fox's participation, and I understand that he did something which cannot be condoned. He sold somebody's property, which he was instrumental in creating but which he was paid for and didn't belong to him. His conception of his right at that time certainly was a wrong one. However, I think that he tried to atone for it and tried to make amends as best he could and that he has exposed himself, as I have been told, on the stand to possible prosecution for tax evasion and things of that matter.

He talked to me about it and I said, "That is what you have to face. You must accept the situation as you created it but you must tell the truth now." Throwing aside all these possibilities and without regard to what the future might hold for him he did take the stand and what he said at that time your Honor knows best. It has been referred (2949) to by Mr. Martin as absolutely truthful cooperation and that whatever he said was corroborated, indicating that in no manner, although he testified against others, did he attempt to embellish nor attempt to make his side appear better than it was.

It may be that a great deal of his background was brought out during the trial. He is a person with a doctorate. He has been stricken from the rolls of the American Chemical Society as a result of his activities in this matter, so now he has a small position out in New Jersey to which he has been relegated for the purpose of supporting his wife and two children. His wife has an aversion to him personally for what he has brought her to. His children have been

held up to ridicule and have been taunted by others because of the publicity given in magazines and newspapers. He brought it all on himself. Your Honor will determine by the judgment in this case whether he has atoned, compensated for what he has done. I heard your Honor say as to the corporation—

The Court: They have enough money to take care of themselves, Mr. Chapman.

Mr. Chapman: As to the corporation, they (2950) might consider raising the salaries of some of their employees thereby not making them amenable to that sort of temptation. We have gone into that in bank matters. They did write you a letter and I know that you will take into consideration their recommendations. They were injured in this case, no question about it. They pointed out to you what he has done for them indirectly by what he has done for the government.

The Court: Don't you think, Mr. Chapman, that there were hundreds of thousands of dollars expended by Cyanamid in this case and wouldn't they have been a little better off if they paid their people with doctorate degrees higher salaries than students out of law school for two years are paid in law offices?

Mr. Chapman: Yes, your Honor. I just made mention of the fact. The very same thing you said, I said. That is a situation I noticed and had it in my notes. Nevertheless, their feeling in the matter toward him is not vindicative. I don't think the government has any desire to see that he is punished any further. I trust that your Honor will be of the same mind.

(2951) The Court: Mr. Fox, do you have anything to say before the court imposes sentence?

Defendant Fox: No, sir.

The Clerk: Joseph Gerace, please.

The Court: Mr. Martin.

Mr. Martin: With regard to the defendant Gerace, he was the first of the defendants to begin cooperating in this matter.

The Court: If it wasn't for him you wouldn't know about the case, would you, Mr. Martin?

Mr. Martin: I would think that is probably a fair characterization, your Honor.

I would say since that time he cooperated fully. As your Honor knows, from hearing the testimony at the trial, his testimony was limited because, but merely because his knowledge of the facts were limited. His role in the conspiracy was limited. There was no question that he has cooperated to the fullest extent possible in the light of his limited knowledge, and there is no question that the testimony that he gave was and is truthful.

The Court: Mr. Howell.

Mr. Howell: Your Honor, I think Mr. Martin has thoughtfully pointed up what has never occurred (2952) as a coincidence to me, that Mr. Gerace's name has always been last in the indictment, in the count to which he pled and in the roster of defendants that has now come before you. It is true that Mr. Gerace was the first to commence cooperating with the authorities and with the Cyanamid Company and through the Cyanamid Company with the authorities. In March, your Honor, of 1962, Mr. Gerace, without retaining counsel, without consulting anything but his own conscience,

delivered the first of several statements to the Federal Bureau of Investigation. That statement was 16 single spaced pages, and was followed with other statements at other times of equal length.

He was indicted in November, so that he fully was conscious that at that moment contrition had taken him. He understood then what he had perhaps not understood at the time he played his small but perhaps vital part in this crime. He has fully admitted and spread himself upon the record, and I mention this only because I understand his appearance at the trial was quite brief and your Honor may not remember the extent and degree of cooperation that went into that brief appearance (2953) on the stand.

The Court: I remember.

Mr. Howell: I suppose I need not mention that Mr. Gerace was only indicted on only one substantive count and was not reindicted in the 1964 indictment. He pleaded guilty immediately and was released without bail.

Mr. Gerace accompanied Cyanamid counsel to Europe expressly for the purpose of discussing the ramifications and the entire scope of what had been done with Mr. Cancelarich and to induce him to return to the United States.

As Mr. Gerace did little and received nothing—I am not condoning what he did do—but if there was a dupe, if there was a pawn in this chess game of Mr. Sharff's, I submit that it was Mr. Gerace.

Your Honor made reference in addressing the other defendants to the degree of demonstrated intelligence of all defendants as testified to by their advanced college degrees and the doctorates held. This, your Honor, does not apply in Mr. Gerace's case. Mr. Gerace is a laboratory technician

strategically located for the purposes of this (2954) conspiracy but susceptible to being impressed, to being flattered by those superior to him in position and potentiality in education and station in life, and these were the ingredients, your Honor, I submit, perhaps unfortunately, in our society out of which dupes are made.

Your Honor of course does have the probation report. I'm sure it shows your Honor that Mr. Gerace, never a highly paid employee, at the point the disclosures of this affair were made, of course, lost his position at Lederle at that time. I'm sure that report shows your Honor that he was, to all intents and purposes, without gainful employment for over a year. He was able to work in his father's store as a clerk and earn something in the nature of $30 to $40 a week during that period. However, through perseverance, through self study and through the help of many who believed in him and believed in his genuine remorse, Mr. Gerace has returned to work in his field of experience and is today employed by the United States Chemical and Plastics Company, a subsidiary of the Coppers Company. He has risen progressively in the past three years from a $80 (2955) laboratory technician to a manager of quality control color at almost double the salary. He has prospects of further advancement. He has been admitted to membership in the Optical Society of the United States and to the International Color Association. His feet are certainly planted on a path that all society can appreciate.

His present employer, your Honor, made himself available to appear here today. I discouraged him. I thought that particularly because of the dimensions of this case and the many who would be speaking for all defendants it

would be superfluous, but he was prepared to come and it was I who told him that I did not think an actual appearance would be necessary.

Mr. Gerace is the father of three children and lives with his wife in his own home up in the Haverstraw area. He is a volunteer fireman in his community, a point which would be disregarded in the metropolitan centers, but one which is considered a highly valuable service for those of us who live in the rural communities, such as I can testify to myself. I have had myself on two occasions need for volunteer firemen.

(2956) This is Mr. Gerace's first offense and first involvement in a criminal proceeding of any nature. I think, your Honor, it is not only reasonable but it is mandated that we assume that there will be no such involvement in the future for Mr. Gerace.

Under the circumstances, as I have come to know this case and as I have come to know Mr. Gerace I can perceive no advantage to society nor would the ends of justice be secured through any sentence involving incarceration as far as Mr. Gerace is concerned.

The Court: Mr. Gerace, do you have anything to say before the court imposes sentence upon you?

Defendant Gerace: No, your Honor.

The Court: It is perfectly obvious, Mr. Gerace, that you were even a cog in this conspiracy. It was so small that no one could ever see you. It is also true that you are the only one in this entire conspiracy who came forward voluntarily, spurred only by pangs of conscience within yourself, to tell the story to Cyanamid. If you had

not opened your mouth I doubt if anybody else would have.

The court will suspend sentence upon you, (2957) Mr. Gerace, on counts 4 and 5 of the indictment, to which you pled guilty.

Defendant Gerace: Thank you, your Honor.

The Court: Mr. Cancelarich, Mr. Fine and Mr. Fox, would you stand up, please.

Pleas are always made for leniency where defendants plead guilty and cooperate with the government. I must advert to what I said when I sentenced the other three defendants. All of you are intelligent men with degrees, Dr. Fox with a doctorate, Mr. Fine and Mr. Cancelarich with master's degrees. Nobody told you to do this. You did this on your own. You weren't goosed, as the saying goes, by either Salb or Sharff or Bottone. The three of you went out and did this, stole from your employers for gain.

Mr. Cancelarich, you said that plainly and clearly on the stand. This was something that came from your own heads and your own hearts and your own minds and you did it and you continued to do it and you fell out among yourselves, and that story is something else for another day. If Mr. Gerace had not gone to American Cyanamid I have great doubt whether any one of the three of you (2958) would have opened your mouths. It is sort of a heads I win, tails you lose situation. If you are not caught you will keep the profits and if you are caught you confess immediately and expect the court not to impose a jail sentence.

Mr. Fox, as far as I know you made about $80,000 on

this deal. There is some testimony of money given to Mr. Cancelarich. I'm not quite sure how much you made, Mr. Fine. But, in any event, I think for the reasons I gave before that as deterrent to other people of your same mentality and in the same areas of trust a jail sentence must be imposed. Consequently, I will impose a six-month term on Mr. Cancelarich on counts 1, 2, 3, 4 and 5 of the indictment of December 21, 1962, said term to run concurrently on all counts.

Mr. Fine, I will impose a sentence upon you of six months on counts 1, 2, 3, 4 and 5 of the indictment dated December 21, 1962, said term of imprisonment to run concurrently.

Dr. Fox, I will impose the same sentence upon you on counts 1, 2, 3, 4, 5, 6, 7, 10 and 11 of the indictment of November 2, 1964, said period of incarceration to run concurrently.

(2959) Mr. Chapman: May I respectfully request that the service of the sentence in the case of Dr. Fox, whom I represent, be deferred for a matter of some two weeks? He has certain experiments that he has with his employer that have to be concluded.

The Court: I will grant the application.

Mr. Chapman: Your Honor, Judge Boxer of the Rockland Court, who is the father-in-law of Dr. Fox, has asked me twice whether he might speak to you and rather than have him think that I have ignored him I'm asking whether you wish to have him talk.

The Court: Our procedure is to have all recommendations submitted in writing to the court. We have no oral

presentation except by the attorneys and the defendants themselves.

Mr. Boxer: I was going to say one thing if your Honor please. He has already served eight or nine months.

The Court: If you want to continue the discussion I will tell you that he is the manipulator of the whole thing and that he made at least $80,000 that I know of.

(2960) Mr. Bauman: I hope your Honor will indulge me long enough to say that in the case of Mr. Cancelarich a sentence works extraordinary hardship in that his wife is not through with her mental problems. There are four children I believe under the age of six. I don't know at this moment and I don't think he knows who is going to take care of those children.

The Court: Do you want time, Mr. Bauman?

Mr. Bauman: Yes, I do want time, sir, and I want, respectfully, if I may do so, without offending the court, to ask you to reconsider the imposition of the jail sentence on Mr. Cancelarich in these circumstances.

The Court: Mr. Bauman, the court has had a tortured time for the last two weeks with this case, and the court will not reconsider its determination.

Mr. Bauman: Will your Honor extend his time to surrender for two weeks?

The Court: I certainly will.

Mr. Brown: If your Honor please, for Mr. Fine, may I make the same request of two weeks?

The Court: The application is granted.

Mr. Brown: Thank you, Your Honor.

# APPENDIX C

## Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of August one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. WILFRED FEINBERG,

*Circuit Judges.*

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United States of America,

Plaintiff-Appellee,

v.

Caesar Bottone, Seymour Salb and Nathan Sharff,

Defendants-Appellants,

John Cancelarich, Leonard Fine, Sidney Martin Fox, Maurice Rosenblatt, Elio Salvetti, and Nicolo Visconti di Madrone,

Defendants.

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Appeal from the United States District Court for the Southern District of New York.

## *Appendix C—Judgment of the United States Court of Appeals*

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By /s/ VINCENT A. CARLIN
Chief Deputy Clerk

## APPENDIX D

### Order Denying Petition for Rehearing, etc.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of September, one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. WILFRED FEINBERG,

*Circuit Judges.*

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United States of America,

Plaintiff-Appellee,

v.

Caesar Bottone, Seymour Salb and Nathan Sharff,

Defendants-Appellants,

John Cancelarich, Leonard Fine, Sidney Martin Fox, Maurice Rosenblatt, Elio Salvetti, and Nicolo Visconti diMadrone,

Defendants.

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A petition for a rehearing together with a motion to stay the issuance of the mandate pending a petition for writ of

certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellants Seymour Salb and Nathan Sharff,

Upon consideration thereof, it is

Ordered that said petition for rehearing be and it hereby is denied.

Further ordered that the issuance of the mandate be and it hereby is stayed subject to Rule 28(c) of the rules of this court.

/s/ A. DANIEL FUSARO
Clerk

## APPENDIX E

### Order Denying Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of September, one thousand nine hundred and sixty-six.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,

*Circuit Judges.*

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United States of America,

Plaintiff-Appellee,

v.

Caesar Bottone, Seymour Salb and Nathan Sharff,

Defendants-Appellants,

John Cancelarich, Leonard Fine, Sidney Martin Fox, Maurice Rosenblatt, Elio Salvetti, and Nicolo Visconti diMadrone,

Defendants.

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*Appendix E—Order Denying Petition for Rehearing In Banc*

A petition for a rehearing in banc having been filed herein by counsel for the appellants Seymour Salb and Nathan Sharff,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO
Clerk